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Some Legal Realism About Legal Theory

Jeremy Kessler & David Pozen

The *University of Chicago Law Review* has published [a response](#) by Charles Barzun to [our article](#) *Working Themselves Impure: A Life Cycle Theory of Legal Theories*. We are grateful to Professor Barzun for his thoughtful engagement with the article. We do not think he has “misunderstood [our] central claims and motivations,” as his author’s footnote anticipates. But we do wish to highlight a few points of agreement and disagreement, because we think they speak to an important divide in contemporary legal theory.

First, agreement. Barzun characterizes our article’s descriptive claims “as plausible and probably correct.” Given that these descriptive claims are the centerpiece of the article, it is heartening that someone otherwise critical of our approach appears to accept its empirical findings. *Working Themselves Impure* argues that the major prescriptive public law theories of the past forty years have evolved in a manner that undermines (or “impurifies”) their foundational normative commitments. Through historical case studies of originalism, textualism, popular constitutionalism, and cost-benefit analysis, the article identifies a common pattern of theoretical change over time—a six-stage “life cycle” that each of the theories has undergone:

Birth—At T_1 , the theory introduces a decision procedure or criterion for judgment that seeks to resolve a highly politicized legal conflict in terms that are relatively alien to the main points of political contention; in so doing, the theory differentiates itself from preexisting legal theories used to negotiate the conflict.

Critique—At T_2 , critics of the theory highlight its failure to secure certain values that gave rise to the conflict in the first place.

Reformulation—At T_3 , the theory responds to these critiques by *internalizing* them—supplementing or modifying its approach so as to better serve the initially ignored values. As a result, the theory’s constituency expands, but at the price of normative and conceptual purity.

Iteration—At T_4 , this process of criticism and response recurs.

Maturity—At T_5 , the theory has come to reflect the conflict-ridden political and theoretical field it had promised to transcend. To the extent the theory ever posed a direct threat to particular participants in the underlying conflict, that danger has dwindled.

Death or Adulterated Persistence—At T_6 , the theory either falls out of favor with mainstream legal actors, at least for the time being, or persists in substantially adulterated form.

A theory that persists at T_6 , we further suggest, likely does so for reasons exogenous to the theory's own—now highly diluted—justifications for its adoption.

Barzun does not contest the degree of fit between this evolutionary model and the leading prescriptive legal theories of our day; nor does he contest our (admittedly partial) inventory of leading theories; nor the inferential steps that take us from individual theoretical developments to the life cycle. Rather, Barzun directs his critical energy at two proposals we offer in the last few pages of the article. The first proposal is to build on our descriptive account by reconstructing the historical development of a wider range of legal theories—determining whether the life cycle holds for them as well—and by developing more detailed hypotheses about the “exogenous” causes of a particular theory's death or persistence. The second proposal is to draw on the fruits of this empirical research when evaluating the stakes of adopting a given prescriptive legal theory, whether encountered at the time of its birth or after having achieved a measure of adulterated persistence.

At times, Barzun suggests that the overarching problem with these proposals is that they assume the coherence of the distinction between internal and external modes of evaluating normative systems, a distinction that Barzun has previously attacked and now calls a “crutch.” Yet the internal/external distinction that our article employs isn't nearly as problematic as Barzun's [more general target](#). We define “internal” in an inductive and discursive manner: a theory's “internal” prescriptions and justifications are just those prescriptions and justifications offered by self-described adherents of that theory. If a theory persists for reasons not identified by its adherents as reasons for adopting the theory, those reasons are “external” to the theory. This method of discourse analysis may be unsatisfying in some respects, but it is perfectly coherent. It also has the virtue of preventing particularly influential adherents of a theory from dictating the theory's meaning and validity for all persons and contexts.

Notably, Barzun appears to concede the coherence of our version of the internal/external distinction. How else could he declare “plausible” the article's inferences about certain theories persisting for reasons not stated on the page? Or spend several paragraphs detailing how our approach could lead practitioners and theorists to pay better attention to the real-world consequences of legal theories that persist despite their failure to produce the practical payoffs promised by theory adherents? Or muse about a quantitative empirical inquiry that would reveal “consistent correlations between theory adoption and [professional] status improvements,” correlations that might in turn “count as empirical support for the hypothesis that these theories linger on because they serve as vessels of professional advancement”? The very possibility of such a thought experiment—Barzun's own—depends on the coherence of our internal/external distinction.

The real basis of Barzun's critique, then, cannot be the conceptual impossibility of distinguishing a theory's internal prescriptions and justifications from the external causes of its adoption and persistence. Barzun's critique ultimately depends on two other assumptions, neither of which we find convincing.

The first assumption is that when the typical lawyer, judge, or professor adopts a prescriptive legal theory she believes “to be right,” she does so because she believes it to be *true*—rather than, say, good or just or efficiency-promoting. In other words, Barzun suggests that the primary concern of most lawyers, judges, and law professors is the *epistemic* rather than practical payoff of prescriptive legal theories used to guide legal decisionmaking. Given this epistemic orientation, the value-added of an intervention such as ours would be to help the “puzzled lawyer” (as Barzun puts it) determine whether a given prescriptive legal theory is true or false.

Seen from this angle, our life cycle theory of legal theories is indeed a dud. Assume that one could marshal mountains of evidence to suggest that a prescriptive legal theory that has failed to produce the practical payoffs it initially promised nonetheless persists because of external reasons—such as the professional advantages its widespread adoption offers to certain officials or scholars, or the political advantages its widespread adoption offers to certain partisans. Would this evidence *falsify* the theory’s core claims? No, of course not. But such evidence might well help lawyers, judges, and law professors determine whether, on balance, the theory leads to results that they take to be either benign or malignant. This sounds a lot like what lawyers, judges, and even law professors actually do in our experience: evaluate prescriptive legal theories in terms of their normative and practical implications (along with their historical pedigree, aesthetic appeal, etc.), rather than their “truth.”

Barzun’s epistemic interpretation of prescriptive legal theories, on the other hand, strikes us as intuitively implausible and empirically contradicted by the discursive practices of most lawyers, judges, and law professors. It may also be logically precluded by some prescriptive legal theories, such as cost-benefit analysis, which does not purport to capture any truth about the law but rather to produce attractive regulatory outcomes.

The one theoretical community where the epistemic orientation is in considerable evidence is originalism, and it is no accident that Barzun returns again and again to originalism as his preferred “hard case” for our approach and proposals. Consider, for example, leading originalist Larry Solum’s [contention](#) that “constitutional theory should be oriented towards the search for truth,” or Will Baude’s [observation](#) that many originalists believe “the original meaning of a document is its real meaning,” or Baude’s own claim that positivist inquiry shows originalism to be “the law.” Not only do these scholars appear to endorse an epistemic interpretation of constitutional theory along Barzun’s lines, but they also link that interpretation to an “internalist” account of originalism’s historical success. That is, they implicitly or explicitly attribute the persistence and popularity of originalism to the theory’s intrinsic merits and the inability of other scholars to falsify its claims. It follows that the only legitimate way to analyze the historical development of originalism—let alone to [criticize](#) the theory—is first to adopt its key premises, engaging with the arguments advanced by originalists in a “[comprehensive](#)” fashion: that is, on their own terms. Only then may one hope to identify inconsistencies or gaps within the theory’s closed language game.

This brings us to Barzun’s second assumption, one that is in considerable tension with his own critique of the internal/external distinction. For like the originalists he cites, Barzun ultimately privileges the internal point of view when it comes to explaining theory persistence. At first, he simply seems to be pointing out that one cannot falsify internal explanations of theory persistence by adducing equally, or even more, plausible external explanations. As discussed above, this point

should go without saying. It only takes on such significance for Barzun—leading him to doubt whether learning about a legal theory’s “social, political, and ideological effects” would be of any “help” at all—because of his assumption that the proper (as well as typical) way to evaluate prescriptive legal theories is in terms of their truth or falsity. Once one rejects this assumption, why shouldn’t a lawyer who is confronted with competing internal and external explanations for the persistence of a highly adulterated legal theory make a judgment call about which is the *more persuasive* explanation, given her practical knowledge about the legal world?

Working Themselves Impure concludes by calling for more lawyers to take seriously the failure of prescriptive legal theories to produce the results they once promised, and to explore more “externalist” hypotheses for the persistence of such theories. (To be clear, this is not a call to take legal arguments or ideas *less* seriously, but rather to broaden our understanding of the social functions they serve and the social forces that operate on them.) When certain theories that fail to achieve their initial goals nonetheless gain and sustain broad support, external explanations may offer a compelling alternative to increasingly convoluted internal explanations. The former cannot defeat the latter, but they do give the legal community a choice. Barzun, however, forecloses this choice: while sociologists or political scientists might be expected to prefer the external explanation, Barzun explains, the puzzled lawyer “likely will (and probably should) adopt the internal account.”

Barzun certainly has history on his side in assuming that most members of the legal community will be inclined toward internal accounts of theory persistence—believing that those prescriptive theories that enjoy long lives do so in virtue of their “intrinsic merits” or because they are, somehow, “right.” Yet some lawyers, judges, and legal scholars, from early-twentieth-century legal realists to late-twentieth-century critics, have occasionally sought to trouble this professional panglossianism. It is our hope that *Working Themselves Impure* will prove useful to those who might wish to do so in the future.